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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1973

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL.,

Petitioners,

vs.

MOW SUN WONG, ET AL.,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondents MOW SUN WONG; SIU HUNG MOK; SISTER FRANCENE LUM; and KAE CHEONG LUI, individually on their own behalf and on behalf of all those similarly situated, ask leave to file the attached Brief In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Respondents' affidavits in support of this motion are attached hereto.

Dated: May 15, 1974.

Respectfully submitted,

EDWARD H. STEINMAN
School of Law
University of Santa Clara
Santa Clara, CA 95053

DAVID C. MOON
Chinatown-North Beach Office
San Francisco Neighborhood
Legal Assistance Foundation
250 Columbus Avenue
San Francisco, CA 94133

By _____
DAVID C. MOON
Attorneys for Petitioners

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5633

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Respondents.

AFFIDAVIT

I, MOW SUN WONG, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by the U.S. District Court for the Northern District of California.

Mow Sun Wong
MOW SUN WONG

Duly witnessed and sworn to before me, a Notary Public, this 15 day of May, 1974.

Joe M. Chan
Notary Public

OFFICIAL SEAL
JOE M. CHAN
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires April 29, 1976

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5930

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Respondents.

AFFIDAVIT

I, SIU HUNG MOK, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by both the District Court and the Ninth Circuit Court of Appeals.

Siu Hung Mok
SIU HUNG MOK

Duly witnessed and sworn to before me, a Notary Public, this 15th day of May, 1974.

Joe M. Chan
Notary Public

OFFICIAL SEAL
JOE M. CHAN
NOTARY PUBLIC - CALIFORNIA
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Respondents.

AFFIDAVIT

I, SISTER FRANCENE LUM, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my/vow of poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by the U.S. District Court for the Northern District of California.

SISTER FRANCENE LUM

Duly witnessed and sworn to before me, a Notary Public, this_____day of May, 1974.

Notary Public

MAY A. CHANG
NOTARY PUBLIC-CALIFORNIA
My Commission Expires July 14, 1977

CHINATOWN-NORTH BEACH LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5830

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Respondents.

AFFIDAVIT OF DORIS YUE

I, DORIS YUE, being duly sworn, depose and say:

1. I am a secretary for the Chinatown Office of the San Francisco Neighborhood Legal Assistance Foundation, a legal services program funded by the United States Office of Economic Opportunity.

2. I speak and comprehend both the English language and Chinese languages, including Cantonese and its various dialects.

3. I translated the respective Affidavits in Support of Motion to Proceed In Forma Pauperis in the above-entitled action from the English language into the Chinese dialect, which is the native language of respondents MOW SUN WONG, SIU HUNG MOK and KAE CHEONG LUI, completely and accurately prior to the execution of the respective Affidavits by MOW SUN WONG, SIU HUNG MOK and KAE CHEONG LUI respectively.

DORIS YUE

Duly witnessed and sworn to before me, a Notary Public, this 15th day of May, 1974.

Notary Public

MAY A. CHANG
NOTARY PUBLIC-CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Commission Expires July 14, 1977

CHINATOWN-NORTH BEACH LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5830

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MOW SUN WONG, ET AL.,

Respondents.

AFFIDAVIT

I, KAE CHEONG LUI, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am one of the respondents in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I believe that I am entitled to the redress I seek in said case.

4. The nature of said cause is briefly stated as follows:

Petitioner seeks review of a decision of the Ninth Circuit Court of Appeals holding a regulation of the United States Civil Service Commission, barring resident aliens from employment in the federal civil service, unconstitutional. Respondents oppose said review. I was granted leave to proceed in forma pauperis by both the District Court and the Ninth Circuit Court of Appeals.

Duly witnessed and sworn to before me, a Notary Public this 13th day of May, 1974.

Kae Cheong Lui
KAE CHEONG LUI

May A. Chang
Notary Public

MAY A. CHANG
NOTARY PUBLIC - CALIFORNIA
My Commission Expires July 14, 1977

CHINATOWN-NORTH BEACH
LAW OFFICE
250 COLUMBUS AVENUE
SAN FRANCISCO 94133
362-5630

Supreme Court, U. S.
FILED
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October Term, 1973

NO. 73-1596

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Petitioners,

vs.

MOW SUN WONG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EDWARD H. STEINMAN
School of Law
University of Santa Clara
Santa Clara, CA 95053
(408) 984-4203

DAVID C. MOON
San Francisco Neighborhood
Legal Assistance Foundation
Chinatown-North Beach Office
250 Columbus Avenue
San Francisco, CA 94133
(415) 362-5630

KENNETH HECHT
Employment Law Center
795 Turk Street
San Francisco, CA 94102
(415) 474-5865

Attorneys for Respondents

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported; it appears in Appendix A, pp. 1a-23a, of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit [hereinafter referred to as "Petition"]. The opinion of the United States District Court (Petition, App. B, pp. 24a-35a) is reported at 333 F.Supp. 527.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, p. 2.

QUESTIONS PRESENTED

1. Whether a regulation of the United States Civil Service Commission, which bars resident aliens from employment in the federal competitive civil service, violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

2. Whether a regulation of the United States Civil Service Commission, which bars resident aliens from employment in the federal competitive civil service, exceeds the authority provided by Congressional statutes and contravenes Executive Order 11,478, issued by the President of the United States.

CONSTITUTIONAL, STATUTORY, REGULATORY, AND EXECUTIVE ORDER PROVISIONS INVOLVED

The pertinent provisions of the Constitution of the United States, the federal Civil Service Act, the federal Civil Service Commission regulations, and the Presidential Executive Order are set forth in the Petition at pp. 2-3.

STATEMENT OF THE CASE

Respondents brought the instant lawsuit in December of 1970 to enjoin the United States Civil Service Commission from enforcing a regulation[1/] which automatically prohibited them--solely because of their status as resident aliens--from applying for, let alone holding, any competitive civil service positions. Though each respondent[2/] had been admitted into the United States as a permanent resident alien, the

---

1/ 5 C.F.R. §338.101 of the Civil Service Commission's regulations (reprinted at p. 3 of the Petition).

2/ The four respondents in this action are Mow Sun Wong, Siu Hung Mok, Francene Lum, and Kae Cheong Lui.

regulation foreclosed them from even attempting to submit an application for federal employment. Though each respondent possessed the qualifications required for the positions of janitor, file clerk, educational evaluator, and mail clerk respectively, the regulation denied them any opportunity to utilize those abilities in federal civil service jobs.

The backgrounds and employment experiences of the respondents alone demonstrate why the United States Court of Appeals for the Ninth Circuit found that no "compelling interest or proper government objective [exists] to justify the total exclusion of aliens from the federal competitive civil service." (Petition, App. A, p. 19a). Before coming to the United States, respondent MOW SUN WONG had worked as an electrical engineer for over 10 years. After entering this country as a resident alien, respondent WONG began working in August of 1970 under the California Supplemental Training and Education Program (STEP). Through this program, which provides on-the-job training for its participants, respondent WONG was actually placed with a federal agency, the United States General Services Administration, to work as a janitor[3/]. According to his supervisor, respondent WONG performed "excellently" in this federal job and his supervisor wished to hire him for a permanent federal position. Nevertheless, once the STEP program ended, respondent WONG was not even given an opportunity to compete for this janitorial position on any basis, since the regulation automatically prohibited the hiring of non-citizens in such federal employment.

3/ The salaries of participants in the STEP project are paid by the California State job training program.

A similar dilemma confronted respondent SIU HUNG MOK. Before his arrival in the United States, he had 18 years of experience as a businessman in both China and Macao. He also participated in the STEP project and was placed with a federal agency--as a file clerk with the Federal Records Center. His supervisor similarly found his work with the federal agency most satisfactory. Yet, solely because of his alien status, respondent MOK was not allowed to be retained as a file clerk with the Federal Records Center after his STEP training program ended.

The alien status of respondent FRANCENE LUM was likewise the sole reason why she was denied the opportunity to even apply for a position as an evaluator of educational programs with the United States Department of Health, Education, and Welfare. Respondent LUM's educational background includes a bachelor of arts degree from Webster College, a master's in education degree from St. Louis University, and periods of graduate study at Stanford, Johns Hopkins, Kansas, and Seton Hall Universities. At the time the instant action was instituted, she had 15 years experience as a teacher of mathematics and of Chinese as a second language in high school, and was then teaching English as a second language to immigrants participating in a Manpower Development and Training Act project. Yet, despite these impressive qualifications, she too was foreclosed from seeking any positions with the federal government because she was not a citizen.

Finally, as the experience of respondent KAE CHONG LUI shows, aliens are not even permitted to keep federal jobs if they should accidently maanage to obtain such positions. Respondent CHEONG was accepted and worked satisfactorily for the United States Post Office loading and unloading mail. Yet, when the federal agency discovered two weeks

after his hiring that he was not a citizen, he was summarily terminated from the job solely for that reason.

In their Complaint, respondents contended that the regulation which foreclosed them from the federal competitive civil service violated the Due Process Clause of the Fifth Amendment and contravened Executive Order No. 11478[4/] and the Public Works Appropriation Act of 1970.[5/] In the memorandum and order issued on August 30, 1971 (Petition, App. B), the United States District Court rejected each of respondents' contentions and ruled on behalf of petitioners. On appeal, the United States Court of Appeals reversed (Petition, App. A), holding that the regulation violated the Due Process Clause of the Fifth Amendment. Finding "[t]he broad sweep [of the regulation] is the vice" (App. A, p. 23a), the Court of Appeals ruled that no "compelling government interest" or "logical or persuasive reason [has been] advanced as to why aliens should be excluded from all federal civil service employment." Ibid.

Subsequent to the Court of Appeals decision, and prior to the filing of the instant Petition for a Writ of Certiorari, the United States District Court, on March 18, 1974, enjoined the petitioners from continuing to deny respondents and other resident aliens the opportunity to compete for federal employment. Pursuant to this order, the United States Civil Service Commission accepted and processed 200 applications from resident aliens seeking federal employment.[6/]

4/ 34 Fed. Reg. 12985 (Aug. 8, 1969) (reprinted in Petition, App. A, pp. 7a-10a, n. 8).

5/ Public Works Appropriation Act, 1970, Pub. L. No. 91-144, 83 Stat. 323, 336 (Dec. 11, 1969) (reprinted in Petition, pp. 4-5, n. 3).

6/ See Affidavit of Robert E. Hampton in Support of Motion to Stay, p. 2, accompanying Petitioners' Application for Stay in the instant case (filed on April 26, 1974, with the Supreme Court of the United States.

Such acceptance and processing have now ceased, pending disposition of the instant Petition for a Writ of Certiorari.

ARGUMENT

Given the changes that the Court of Appeals' decision below will cause in the operation of the United States Civil Service, it would be disingenuous for respondents to deny the importance of that decision. Yet, respondents strongly contend that the Petition for a Writ of Certiorari be rejected, since the decision below falls clearly within this Court's opinion last term in Sugarman v. Dougall, 93 S.Ct. 2842 (1973). Petitioners openly recognize that Sugarman holds that state and local governments may not deny resident aliens the right to apply for and hold positions in their respective competitive civil service systems. Petition, pp. 6-7. Yet, petitioners claim that the federal government has the constitutional right to discriminate against aliens in the operation of its competitive civil service system. As the decision below carefully demonstrated--and as this Brief in Opposition will reaffirm--the Constitution of the United States contains no exception which exempts the federal government from adhering to its requirements.

I.

THERE IS NO CONFLICT OF DECISIONS.

Petitioners contend that the decision of the Court of Appeals below conflicts both with a long-followed policy of the federal Civil Service Commission and with the statutory authorization for such policy. Petition, p. 7. Yet, the existence of a conflicting administrative interpretation or possible Congressional sanction does not rise to a "conflict of decisions" to which this Court gives great weight in deciding whether to grant a petition for a writ of

certiorari. In fact, there is complete agreement in the decisions[7] of the only two United States Courts of Appeals which have examined the discriminatory federal regulation, 5 C.F.R. § 338.101, concerning the proper standard of judicial scrutiny to be applied in determining the constitutionality of that regulation. In the instant case, petitioners have consistently contended that the constitutionality of the regulation should be measured by the general "rational basis" standard of review. E.g., Petition, p. 9. The decision of the Court of Appeals below rejected this contention [8] and instead subjected the discriminatory regulation to the most rigid test of judicial scrutiny, requiring

> the Government [to] establish a compelling interest or proper government objective to justify the total exclusion of aliens from the federal competitive civil service.
>
> Wong v. Hampton, supra (Petition App. A, p. 19a)

Similarly, in Jalil v. Hampton--the only other decision to consider the constitutionality of 5 C.F.R. § 338.101--the court recognized that since classifications based on alienage are suspect, the government must justify the discriminatory regulation on the grounds of a "special" and compelling governmental interest.[9] Though the disposition of the Jalil case meant that the constitutional question was

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7/ Wong v. Hampton, ___ F.2d ___ (Jan. 25, 1974), cert. filed, ___ U.S. ___ (April 24, 1974); Jalil v. Hampton, 460 F.2d 923 (D.C. Cir.), cert. den., 93 S.Ct. 112 (1972).

8/ The Court of Appeals did recognize that respondents made "a strong argument for finding that even under the less onerous general rational relationship standard, the government fails to satisfy its burden." Wong v. Hampton, supra (Petition, App. A, p. 19a, n. 15).

9/ 460 F.2d 923, 929 (D.C. Cir. 1972).

not reached,[10] a dissenting opinion did reach that issue and found the regulation violated the Due Process Clause of the Fifth Amendment to the Constitution of the United States.[11]

II.

THE DECISION BELOW IS CLEARLY CORRECT.

In striking down the federal regulation barring aliens from the federal competitive civil service, the court below employed the approach taken by this Court in both Sugarman v. Dougall, supra, and Graham v. Richardson, 403 U.S. 365 (1971). The lower court first ruled--based on the Sugarman and Graham decisions--that respondents are members of "a 'suspect' class. . . because aliens 'are a prime example of a discrete and insular minority.'" Wong v. Hampton, supra (Petition, App. A, p. 15a). Since the federal regulation classifies on the basis of such alienage, the court below then subjected the regulation "'to close judicial scrutiny'" to see if the discrimination could be justified. Ibid. And, as in the two Supreme Court cases, the Court of Appeals found "no logical or persuasive reason advanced as to why aliens should be excluded from all federal civil service employment." Id. at p. 23a.

Though the reasoning process utilized by the court below exactly paralleled that taken by this Court in both Sugarman and Graham, petitioners nevertheless find fault with each step of the approach. They first suggest

---

10/ Since there were no findings of fact in the district court's order, the Court of Appeals in Jalil remanded the case to the trial court to decide the non-constitutional questions. 460 F.2d at 927-928. In the instant case, findings of fact were made and the non-constitutional questions were decided. See Wong v. Hampton, supra (Petition, App. A, p. 18a).

11/ 460 F.2d at 930, 931 (dissenting opinion).

that resident aliens like respondents should not be accorded special treatment since "[a] lienage--unlike race, color, or national origin--is not a permanent 'status,' but a temporary condition." Petition, p. 9. Such a statement totally contradicts the explicit holdings of this Court that aliens are a "suspect class" entitled to close judicial scrutiny. E.g., Sugarman v. Dougall, supra, 93 S.Ct. at 2847; Graham v. Richardson, supra 403 U.S. at 372. Regardless of their permanent or temporary condition,[12/] aliens possess the "traditional indicia of suspectness" which require the invocation of strict judicial scrutiny. San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1278, 1294 (1973). They fall directly within the ambit of this special judicial protection because, as this court explained in Rodriguez, they are members of a class

> saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.
>
> Ibid.[13/]

12/ It is interesting to note that each of the four named appellees in the Sugarman case had lived in this country more than five years, which meant they qualified for naturalization as citizens under 8 U.S.C. § 1427(a). Sugarman v. Dougall, supra, 93 S.Ct. at 2845. Yet, the fact that none of these resident aliens chose to exercise their option to become citizens did not alter this Court's findings that they were members of a "suspect class" who deserved close judicial scrutiny.

13/ Petitioners claim that none of the court decisions concerning aliens has accorded them "a constitutionally protected right to federal civil service employment." Petition, p. 9. Such a statement, however, completely confuses the issue decided by the court below. Respondents do not claim a right to federal employment, but an equal opportunity to apply for and hold such employment based on their qualifications and not on their alien status. As the Court of Appeals correctly stated:

> The issue before this Court on appeal is whether the United States Civil Service Commission may, consistent with the Fifth

(footnote continued)

Petitioners then contend that because the "national government, unlike the states, exercises plenary authority over aliens," its regulation should not be subjected to close judicial scrutiny, but instead must satisfy only the rational basis standard. Petition, p. 8. Such a contention, in essence, suggests that Congress can ignore the Constitution--and the requirement of close judicial scrutiny for aliens subjected to discriminatory laws--because it has "plenary authority" over aliens. Yet, the existence of "plenary authority over some matters is no substitute for constitutional protections and requirements. As the court below clearly found:

> To state that Congress' plenary power over aliens enables the federal government to unreasonably discriminate against aliens, neglects to consider the fact that even Congressional plenary power is subject to Constitutional limits.
>
> Wong v. Hampton, supra, (Petition, App. A, pp. 12a-13a)

Not surprisingly, the two cases[14/] cited by petitioners in support of their "plenary" power contention (Petition, pp. 8-9) reveal that such authority does not justify the invocation of any lesser judicial scrutiny for respondents. These cases deal with matters of entry, deportation, and foreign relations--the judicial contexts in which the proposition of "plenary" powers has been stated. In such

---

(footnote 13 continued)

> Amendment's due process guarantee, exclude [respondents] and all other resident aliens from obtaining employment in the federal competitive civil service [solely because of their alienage].
>
> Wong v. Hampton, supra, (Petition, App. A, pp. 3a-4a)

14/ Harisiades v. Shaughnessy, 342 U.S. 580 (1951); Johnson v. Eisentrager, 339 U.S. 763 (1950).

situations, issues of foreign affairs, national security, and sovereignty are inevitably intertwined.

> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state.
>
> Harisiades v. Shaughnessy, 342 U.S. 580, 587-588 (1951) (emphasis added)

As the court below found (Petition, App. A, pp. 21a-22a), the paramount issues of this country's sovereignty and security are not present in the instant case. Rather, the court below merely granted respondents the opportunity to apply to and work for the federal government in any position where their skills could be utilized. The factors which give Congress great latitude in questions of entry and deportation are simply not germane to a resident alien's employment goals. Thus, whatever judicial deference is accorded Congress' exercise of "plenary power" in areas of foreign affairs or the entry and deportation of aliens has no application to the instant case.

Finally, petitioners intimate support for their "plenary power" rationale by distinguishing Sugarman v. Dougall, in which this Court struck down a New York statute denying aliens the right to hold positions in that state's competitive civil service. Petitioners claim the vice of the New York exclusion was that "it reached beyond the legitimate interests of New York as a sovereign political community." Petition, p. 8. Such vice, they contend, is not present in the instant case since the "Federal Government possesses national sovereignty." Ibid.

Ironically, this very issue of New York "reach[ing] beyond [its own] legitimate interests" was explicitly not decided by this Court in Sugarman. This Court held that the

New York statute violated Constitutional guarantees of equal protection because it "denies all aliens the right to hold positions in New York's competitive civil service." 93 S.Ct. 2842, 2849 (1973). Since the Sugarman case was decided on this constitutional basis, this Court said

> we need not reach the issue whether the citizenship restriction is in conflict with Congress' comprehensive regulation of immigration and naturalization.
>
> Id. at 2850[15/]

There is thus no support in either law or logic that the federal government's "plenary power" over aliens eliminates or lessens petitioners' Constitutional burden of demonstrating a compelling and substantial reason why respondents should be automatically excluded from seeking federal employment. As the court below found, none of the possible "justifications" which can be conjured up to support the regulation rises to the level of justifying its discrimination based on alienage. Wong v. Hampton, supra (Petition, App. A, pp. 19a-23a). Apparently, petitioners concur with almost all of these findings of the court below. In their petition, they offer only one possible government interest to justify the admitted discrimination--that an alien has "a foreign call on his loyalities." Petition, p. 8. Admittedly, factors

---

15/ In cases where this Court has reached the issue of a conflict between federal and state laws, it has upheld the national power to regulate immigration as an alternative holding to finding the state laws unconstitutional. E.g., Graham v. Richardson, 403 U.S. 365, 375 (1971) ("An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny ... ") (emphasis added); Takahashi v. Fish & Game Comm., 334 U.S. 410 (1948).

of "loyalty" and security make federal government employment different from most employment situations. As the court below found, there may be certain employment positions in the federal civil service where concerns for loyalty and security foreclose aliens from seeking or holding those jobs. Wong v. Hampton, supra (Petition, App. A, p. 21a). Unfortunately, the regulation challenged in the instant case sweeps over all employment positions, regardless of these factors.

> [T]he Commission regulations fail to delineate any specific positions where security, loyalty and policy-making require that the citizenship requirement be essential for employment. Instead, they automatically exclude all aliens from the competitive civil service.
>
> Id. at pp. 21a-22a

Since the regulation explicitly discriminates against resident aliens and since no compelling or persuasive reason justifies such discrimination, the decision of the court below is clearly correct.

CONCLUSION

For the reasons stated in this Brief in Opposition, respondents respectfully submit that the Petition for a Writ of Certiorari be denied.

Date: May 15, 1974

Respectfully submitted,

EDWARD H. STEINMAN
School of Law
University of Santa Clara
Santa Clara, CA 95053
(408) 984-4203

DAVID C. MOON
San Francisco Neighborhood
Legal Assistance Foundation
Chinatown-NorthBeach Office
250 Columbus Avenue
San Francisco, CA 94133
(415) 362-5630

KENNETH HECHT
Employment Law Center
795 Turk Street
San Francisco, CA 94102
(415) 474-5865

By Edward H. Steinman
Edward H. Steinman
Attorneys for Respondents